

FILED APR 12 2010

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
EUGENE DIVISION

KENNETH ROBERT BURNETT,

Plaintiff,

Civil No. 09-312-TC

v.

FINDINGS AND  
RECOMMENDATION

WARDEN J.E. THOMAS, et al.,

Defendants.

COFFIN, Magistrate Judge.

On March 23, 2009, plaintiff, an inmate in the custody of the Oregon Department of Corrections, filed a complaint under 42 U.S.C. § 1983 alleging that defendants failed to provide him with adequate medical care. On May 20, all defendants, through their attorney declined to waive service. On May 22, 2009, the court entered an order directing the clerk to issue process and ordering service of the summons and complaint by the U.S. Marshal's Service. Order (#11).

On June 1, 2009, plaintiff was requested to provide the clerk with copies of the complaint for each defendant for service with the USMS. There is nothing in the record that indicates whether plaintiff ever provided the court with copies of the complaint or returned the completed forms for service by the USMS.

Subsequently plaintiff moved to file an amended complaint. By Order (#16) entered August 6, 2009, plaintiff's motion to file an amended complaint was denied.

Plaintiff has not filed any documents or otherwise contacted the court since he filed a notice of change of address on August 5, 2009. The notice of change of address indicates that plaintiff has been released from custody.

If a defendant is not served within 120 days after the complaint is filed, the court... must dismiss the action without prejudice against that defendant or order that service be made within a specified time." Fed. R. Civ. P. 4(m). Proof of service must be made to the court. Fed.R.Civ.P 4(1). To date, no such proof of service has been made to the court.


On February 2, 2010, plaintiff was ordered to show cause by March 19, 2010 why this action should not be dismissed for failure to serve summons and complaints on defendants. Plaintiff was advised that failure to respond to the court's order may result in the dismissal of this action. Order (#17). Plaintiff did not respond to the court's order.

This action should be dismissed for failure to serve

defendants and for failure to prosecute.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the court. Thereafter, the parties have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation.

DATED this 1 day of April, 2010.

  
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Thomas M. Coffin  
United States Magistrate Judge